Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-9291

* * *

W. J. ESTELLE, JR., RALPH GRAY,
AND H. H. HUSBANDS,
Petitioners

V.

J. W. GAMBLE,
Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

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PETITION FOR A WRIT OF CERTIORARI
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* * *

The Petitioners, W. J. Estelle, Jr., Ralph Gray and H. H. Husbands, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals, *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975) appears in the Appendix at 21-25. The order and judgment entered by the District Court for the Southern District of Texas, Houston Division, dismissing Respondent's complaint

for failure to state a claim upon which relief could be granted, appear in the Appendix at 14-19. The order of that District Court denying Respondent permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith appears in the Appendix at 20.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 4, 1975. A timely petition for rehearing and suggested rehearing *en banc* was denied on October 2, 1975, Appendix at 26, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether an inmate's *pro se* complaint which states that his injury has been diagnosed and treated by two licensed physicians raises a constitutional question or states a claim under 42 U.S.C. § 1983 upon which relief can be granted.

2. Whether the court of appeals erred in reversing the district court's summary dismissal of a complaint where both the judgment of the court of appeals and the complaint of the inmate rest upon a disagreement with licensed physicians as to diagnosis and treatment of the inmate's injury.

3. Whether a court of appeals has the power to decide a factual issue of paramount significance, which was neither presented to nor litigated in the district court, on the basis of hearsay evidence presented at the appellate level by means of an appendix to complainant's brief.

STATUTE INVOLVED

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent, an inmate in the Texas Department of Corrections (T.D.C.), filed the *pro se* complaint contained in the Appendix hereto at 1-13 (A.1-13) under 42 U.S.C. § 1983 against Petitioners W. J. Estelle, Jr., Director of T.D.C., Ralph Gray, Medical Director of T.D.C. and chief medical officer of the prison hospital, and H. H. Husbands, Warden of the Walls Unit.

The United States District Court for the Southern District of Texas, Houston Division, summarily dismissed the complaint for failure to state a claim upon which relief could be granted. (A. 14-19).

Subsequently, the District Court denied Respondent's motion to vacate judgment and further denied him permission to appeal under 28 U.S.C. § 1915 due to want of merit and good faith. (A. 20).

The United States Court of Appeals for the Fifth Circuit granted Respondent's application for leave to appeal in forma pauperis and appointed Mr. Daniel K.

Hedges of Fulbright & Jaworski, Houston, Texas, to represent him on appeal. That Court had jurisdiction under 28 U.S.C. § 1291. After the submission of briefs and oral argument, the Court of Appeals reversed and remanded the cause with instructions to re-instate the complaint, appoint counsel and permit appropriate amendment. *Gamble v. Estelle*, 516 F.2d 937 (5th Cir. 1975); (A. 21-25).

Petitioners' timely application for rehearing and suggested rehearing *en banc* was denied on October 2, 1975. (A. 26).

Since the decisions of the courts below, and the decision of this Court with respect to the instant Petition, depend entirely upon the *facts* alleged by Respondent in his complaint, Petitioners find it necessary to set them out.

On *November 9, 1973*, Respondent, while unloading cotton bales from a truck and flipping them to a machine, sustained an injury to his lower back. A "6.00" (?) pound bale, which Respondent was flipping, started falling flat and fell on him while he was attempting to prevent it from falling. (A. 2).

Respondent worked four more hours, at which time he became stiff and requested a pass to the hospital. There, he was checked by a medical assistant (Captain Blunt) for a hernia and was sent to his living quarters. Two hours later, Respondent returned to the hospital, was given two pain pills by an inmate nurse, and saw a *doctor*. (A. 2).

The next day, *November 10, 1973*, Respondent was examined by *Dr. Astone* at the hospital who diagnosed his injury as a lower back sprain. *Dr. Astone* placed

Respondent on cellpass-cellfeed for two days, which meant he could remain in his cell, and prescribed Zactirin and Robaxin. (A. 3).

On *November 12, 1973*, Respondent again saw *Dr. Astone* at the hospital who continued the same medication and extended the cellpass-cellfeed. (A. 3).

On *November 19, 1973*, Respondent again saw *Dr. Astone* who prescribed Robaxin and Febridyne for seven days and extended the cellpass-cellfeed. (A. 3).

On *November 26, 1973*, Respondent again saw *Dr. Astone* who prescribed Zactirin for five days and extended the cellpass-cellfeed for seven days. (A. 3).

On *December 3, 1973*, Respondent again saw *Dr. Astone* who prescribed Febridyne for seven days but took him off the cellpass-cellfeed, which meant that he would do light work. The same day, Respondent went to Major Muddox's office and told him he was not going to work because of lower back pain, and Respondent was placed in administrative segregation. (A. 4).

On *December 5, 1973*, Respondent was taken before the unit disciplinary committee. He told the committee that he was still hurting, that he had only been given pain pills, and that *Dr. Astone* had not even noticed his high blood pressure. The committee took no action against Respondent and sent him to see another *doctor*. (A. 4).

The next day, *December 6, 1973*, Respondent saw *Dr. Gray*, the TDC Medical Director and chief medical officer of the prison hospital, at the hospital who administered urinalysis, blood analysis, and high blood pressure tests. *Dr. Gray's* diagnosis of his back injury was that he had incurred a lower back sprain. Respondent's blood pressure was found to be 168/112. *Dr. Gray* prescribed Serapes and Febridyne. (A. 4-5).

On *December 13, 1973*, Respondent saw *Dr. Gray* for back pain and high blood pressure. The blood pressure reading was found to be 152/98 and *Dr. Gray* prescribed Serapes for thirty days. (A. 5).

On *December 17, 1973*, Respondent saw medical assistant Blunt at the hospital for back pain and received a prescription of Tiognolos for seven days. (A. 5).

On *December 27, 1973*, Respondent again saw medical assistant Blunt who continued the Tiognolos prescription for seven days.

On *January 3, 1974*, Captain Linsley asked Respondent if he wanted to go to work. He replied that he was not going to work hurting, and Captain Linsley stated that he would send him to the farm. (A. 6).

On *January 5, 1974*, Lieutenant Ramsey asked the same question, received the same reply, and made the same statement. (A. 6).

On *January 7, 1974*, Respondent went to the hospital for lower back pain, high blood pressure, and migraine headaches. Medical assistant Blunt prescribed Sodium Solicylate for seven days and Serapes for thirty days. (A. 6).

On *January 17, 1974*, Respondent went to the hospital for lower back pain and stomach pain. Medical assistant Blunt prescribed Sodium Solicylate for seven days. (A. 7).

On *January 25, 1974*, Respondent went to the hospital for lower back pain. Medical assistant Blunt prescribed Sodium Solicylate for thirty days. (A. 7).

On *January 31, 1974*, Respondent was brought before the unit disciplinary committee pursuant to his refusal to go to work on *January 5*. He told the committee that he was not going to work with his lower back pain and high blood pressure. Medical assistant Blunt told the committee that Respondent's health classification was first class. The committee's ruling was adverse to Respondent, and he was placed in solitary confinement for refusing to work. (A. 7-8).

On *February 4, 1974*, Respondent complained of chest pain and black outs in the morning and was admitted to the hospital that evening. (A. 8).

On *February 5, 1974*, *Dr. Heaton* interpreted an electrocardiagram administered to Respondent as follows: multiple unifocal P.V.C., S (re-entry often), inverted T wave, A.V.R. - lead 3 (normal), elevated P wave. (A. 8).

On *February 6, 1974*, Respondent was transferred to administrative segregation and was placed on Quinidine pills by *Dr. Heaton* for three days. (A. 8). Respondent was still having chest pain when he was discharged from the hospital.

On *February 8, 1974*, Respondent asked Officer Spencer to go on sick call for lower back pain, chest pain and black outs when he stood up. Officer Spencer went to check and on his return told Respondent they did not want him to go on sick call. (A. 9).

On *February 9, 1974*, Respondent again complained of chest pain and saw *Dr. Heaton* at the hospital who continued the Quinidine prescription for another three days.

On *February 11, 1974*, Respondent signed the complaint, alleging the foregoing facts. (A. 13).

REASONS FOR GRANTING THE WRIT

I. The Decision Below, By Raising A Disagreement With Licensed Physicians As To Diagnosis And Treatment To A Constitutional Plane, Conflicts With The Decisions Of Eight Other Courts Of Appeals.

A. The Respondent's complaint and the decision below consist of a simple disagreement with licensed physicians as to diagnosis and treatment.

When the Respondent's *pro se* complaint is read with great liberality as to form, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and with special scrutiny as to the facts alleged, assuming them to be true, *Cooper v. Pate*, 378 U.S. 564 (1964), it is clear that Respondent's entire complaint rests on a difference of opinion with his physicians as to the diagnosis and treatment of his back injury. Of more alarming significance is that the opinion of the court below is premised upon a similar difference of opinion between the honorable judges and the physicians, resulting in federal constitutional intervention.

The Respondent himself stated that he saw Dr. Astone five times (A. 3-4), Dr. Gray two times (A. 4-5), and medical assistant Blunt six times (A. 2, 5, 6, 7). In addition, Respondent saw an unidentified doctor on the very day he was injured. (A. 2).

Contrary to the assertion of the court below that "the State . . . failed to diagnose Gamble's lower back injury," *Gamble v. Estelle*, 516 F.2d 937, 941 (5th Cir. 1975), both Dr. Astone and Dr. Gray, the T.D.C. Medical Director and chief medical officer of the prison hospital, diagnosed Respondent's back injury as a lower back sprain. (A. 3, 4).[1]

The doctors variously prescribed bed rest (cellpass-cellfeed), analgesics and/or muscle relaxants for the back sprain. Each of these plays a definite role in the *treatment* of lower back dysfunction, FINNESON, LOW BACK PAIN 95, 108, 111 (1973), contrary to the assertion of the court below that "the only medication prescribed was to relieve the pain, not to cure the injury." *Gamble v. Estelle, supra* at 941.

Further signifying the underlying difference of opinion between the judges and the doctors, the court below stated:

> "[T]he exact nature of the back injury remains unknown. Certainly the pain pills had no curative effect, even though they were administered for some 3 months."
> *Id.*

Contrary to the court's conclusion, the persistence of the pain was not an indication that the Respondent's injury was not a simple muscle sprain for "[t]here is no relationship *whatsoever* between the severity of the injury and the *intensity* or *duration* of the symptoms FINNESON, LOW BACK PAIN, *supra* at 90 (emphasis supplied). Moreover, the continuing pain could well

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[1]Dr. Gray did so after administering urinalysis and blood analysis tests, which are useful in eliminating the possibility that the back pain was caused by a systemic (organic) disease. KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN 29 (1970).

have been caused by Respondent's refusal to discontinue his prolonged bedrest as ordered by Dr. Astone.[2] FRIEDMANN & GALTON, FREEDOM FROM BACKACHES 100 (1973); KRAUS, CLINICAL TREATMENT OF BACK AND NECK PAIN, *supra* at 24, 122.

The court below further suggested that x-rays and other tests should have been conducted "that would have led to *appropriate* diagnosis and treatment." *Gamble v. Estelle*, *supra* at 941 (emphasis supplied). First, a comprehensive examination of low back pain consists of a series of simple physical movements and should take no more than fifteen minutes. FINNESON, *supra* at 41-48. Second, Petitioners could discuss the relative attributes in terms of utility, risks etc. of various tests including x-rays, electromyograms, myelographies, discographies, and analysis of spinal protein fluid, but such a discussion would serve no useful purpose except to further emphasize the Respondent's and the court below's disagreement with the physicians' diagnosis of a lower back sprain.

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[2]Note that Respondent's self-imposed bedrest causes "certain circulatory changes which may give rise to light-headedness and in some cases syncope once the erect position is resumed." FINNESON, *supra* at 96. Moreover, "[i]f the patient is under chronic stress, as most chronic . . . back patients are, the effect of the stress may help produce cardiovascular, gastro-intestinal, or other diseases." KRAUS, *supra* at 29. Indeed, Respondent's inversion of the T waves have generally been found in anxious patients, HURST & LOGUE, THE HEART 1471 (2d ed. 1970), though some normal persons have them. LITTMAN, TEXTBOOK OF ELECTROCARDIOGRAPHY 74 (1972). In addition (Respondent's) elevated P waves may be caused by hypertension. WHITE, HEART DISEASE 209 (1951).

B. Eight other courts of appeals have held that a disagreement with licensed physicians as to diagnosis and treatment does not raise a constitutional question or state a claim under 42 U.S.C. § 1983.

It is fundamental that the primary element necessary for recovery under 42 U.S.C. § 1983 is a deprivation of a right secured by the "Constitution and laws" of the United States. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). In the area of medical care afforded inmates, the requisite constitutional infirmity for federal jurisdiction has to be based on a transgression of either the eighth amendment's prohibition against cruel and unusual punishment or the fourteenth amendment's protection of life. Thus, eight courts of appeals have held that a complaint alleging a *refusal* to provide medical care states a claim under § 1983, but that a claimed *inadequacy* of treatment does not, absent *exceptional* circumstances.

In *Coppinger v. Townsend*, 398 F.2d 392, 394 (10th Cir. 1968), one court of appeals stated the distinction as follows:

> "A claim of total denial of medical care differs from a claim of inadequacy of medical care. . . .[I]n the instant case the allegations of the complaint show that medical care has been furnished. . . . The prisoner's right is to medical care-not to the type or scope of medical care which he personally desires. *A difference of opinion between a physician and a patient does not give rise to a constitutional right or sustain a claim under § 1983.*"(Emphasis supplied).

Three other courts of appeals have reasoned as follows:

> "[A]llegations of mere negligency in the treatment of a prisoner's condition or *claims based on*

a difference of opinion over matters of medical judgment fail to state a federal constitutional question. . . . [T]he *claimed inadequacy* of treatment must be predicated on *obvious neglect* or *intentional misconduct* by the prison officials (citations omitted), and must be so *heinous* as to constitute cruel and unusual punishment as that term is used in the Eighth Amendment or so endanger the prisoner's physical well-being that his Fourteenth Amendment right to life is violated." *Freeman v. Lockhart*, 503 F.2d 1016, 1017 (8th Cir. 1974) (emphasis supplied).

"[A] claim is not stated where (a prisoner) alleges no more than that he is dissatisfied as to the adequacy of treatment actually received for a particular injury or ailment. (Citations omitted). *Courts will not attempt to second-guess licensed physicians as to the propriety of a particular course of medical treatment for a given prisoner-patient." Thomas v. Pate*, 493 F.2d 151 (7th Cir. 1974). (emphasis supplied).

"Plaintiff is suffering from a back injury resulting from an automobile accident in 1958; the condition is painful but it is also chronic; he has not been denied access to medical help but has been permitted 'many times' to visit the prison hospital; he has not been denied treatment but has on occasion been given 'some type of pills for medication or some type of physical therapy, which does not help the plaintiff's back and neck.' Thus, plaintiff's allegations show only that he has not been receiving the kind and quality of medical treatment he believes is indicated." *Stiltner v. Rhay*, 371 F.2d 420, 421 n.3 (9th Cir.) cert.denied, 387 U.S. 922 (1967).

The decision of the court below conflicts with the decisions of yet four other courts of appeals. See *Fitzke v. Shappell*, 468 F.2d 1072, 1076 n.4 (6th Cir. 1972); *Corby v. Conby*, 457 F.2d 251 (2d Cir. 1972) and *United States ex rel. Hyde v. McGinnis*, 429 F.2d 864 (2d Cir. 1970); *United States ex rel. Johnson v. Prasse*, 450 F.2d 946 (3d Cir. 1971) and *Gittlemacker v. Prasse*, 428 F.2d 1 (3d Cir. 1970); *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973).

II. The Decision Below Designates The Federal District Courts As Medical Review Boards For Physicians In Correctional Institutions.

If a complaint which stipulates that the inmate has seen several different doctors on numerous occasions and that these doctors have diagnosed his injury and prescribed treatment does not warrant summary dismissal, no complaint will. If the district court could not dismiss under the *facts* alleged in the Respondent's complaint, every future treatment may be challenged.

The court below prescribed the appropriate medical course of action to be x-rays and other tests of Respondent. The basis for such a judicial medical prescription can be none other than a simple disagreement with the diagnoses of the doctors. Quite simply, this means that if an inmate were examined by a dozen different doctors, each of whom diagnosed an injury as a lower back sprain, a district court could not dismiss the case for failure to state a claim because the doctors believed x-rays and other further tests to be unnecessary for their diagnoses. In sum, instead of allowing experienced and trained physicians to decide which inmates genuinely need to be x-rayed and tested further, the court below has removed that medical judgment from the hands of the doctors and placed it in the courts.

Thus, if an inmate hereafter complains that the doctors have not cured his ailment, the federal district courts must intervene and review the physicians' diagnoses and treatment.[3] As a result, "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous complaints." *Procunier v. Martinez*, 94 S.Ct. 1800, 1807 (1974).

III. The Court Below Usurped Power By Deciding An Issue Not Raised In The District Court By Means Of Hearsay Evidence Presented At The Appellate Level.

On the basis of the Report of the Citizens Advisory Committee to the Joint Committee on Prison Reform of the Texas Legislature, a portion of which was reproduced in the Appendix to Respondent's brief below, the court below found that, "the general medical services afforded by the State [of Texas] in its prisons are publicly known to be 'woefully inadequate.'" *Gamble v. Estelle, supra* at 940 and n.1.

Though the issue of the adequacy of general medical services afforded by the T.D.C. is presently being actively litigated in numerous major lawsuits, *e.g. Ruiz v. Estelle*, Civil Action No. TY-5523 (E.D. Tex., filed Aug. 17, 1972), the court below decided this fact question in circumstances where it was not even presented to nor litigated in the district court. Moreover, the court did so on the basis of hearsay evidence presented *on appeal* in the Appendix to Respondent's brief, said hearsay

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[3]If this be a constitutional right, the courts should also recognize it for indigents outside of prison who cannot even afford to see two doctors on numerous occasions for a back injury.

consisting of a working paper which was not endorsed, adopted or issued by either the Joint Committee on Prison Reform or the Texas Legislature. (A. 27-28).

Additionally, it should be noted that the question of the adequacy of medical services in general is *totally irrelevant* to the issue of whether the treatment afforded *Respondent* abridged constitutional safeguards.

Petitioners submit that the court below exercised power not available to it under Article III of the United States Constitution by deciding an issue of paramount significance, which was neither before it nor the district court and whose determination was not necessary to the disposition of the case.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joe B. Dibrell, a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above mentioned cause on behalf of the Petitioners. I do therefore certify that three copies of the foregoing Petition have been served by placing same in the United States Mail, First Class, Certified and Postage Prepaid, on this the 30th day of December, 1975, addressed to: Mr. Daniel K. Hedges, Attorney for Respondent, 800 Bank of the Southwest Building, Houston, Texas 77002.

JOE B. DIBRELL
Assistant Attorney General